No. 91-865

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ILLINOIS STATE BOARD OF EDUCATION,

Petitioner,

v.

BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS, DOUGLAS C. CANNON and SHELDON AND PAULINE BROZER on behalf of ADAM BROZER,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) requires the States to provide a free appropriate public education to all children with disabilities through personalized instruction with sufficient support services to enable the child to benefit educationally from that instruction.

The questions presented for review are:

1. Whether the Seventh Circuit's ruling is in conflict with *Hendrick Hudson Dist. Board of Education v. Rowley*, 458 U.S. 176 (1982), in that it imposes an additional obligation on the States to defer to parental hostility to the Individualized Education Program (IEP) developed for the child, when the IEP is otherwise reasonably calculated to enable the child to receive educational benefits?

2. Whether the Seventh Circuit's grant of a parental veto power over a proposed IEP conflicts with the other circuits' rulings that parental preference does not determine the appropriateness of an IEP?

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BOARD OF EDUCATION OF COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 21, COOK COUNTY, ILLINOIS, DOUGLAS C. CANNON and SHELDON AND PAULINE BROZER on behalf of ADAM BROZER,

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 23, 1991.

OPINIONS BELOW

The August 21, 1991 order of the United States Court of Appeals for the Seventh Circuit denying Respondent

Board of Education's Petition for Rehearing is not published, but is reprinted in the appendix hereto. App. 17.

The July 23, 1991 opinion of the United States Court of Appeals for the Seventh Circuit is reported *sub nom. Board of Education of Community Consolidated School District No. 21, Cook County, Illinois v. Illinois State Board of Education, Douglas C. Cannon and Sheldon and Pauline Brozer on behalf of Adam Brozer*, at 938 F.2d 712 (7th Cir. 1991), and is reprinted in the appendix hereto. App. 1.

The October 22, 1990 memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but is reprinted in the appendix hereto. App. 19.

The May 7, 1990 administrative decision and order of Douglas C. Cannon, Level II Hearing Officer, is not reported but is reprinted in the appendix hereto. App. 40.

The March 8, 1990 administrative decision of Margie Best, Level I Hearing Officer, is not reported but is reprinted in the appendix hereto. App. 52.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on July 23, 1991. On August 21, 1991, the court denied the Respondent Board of Education's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS

Part A, §§ 602(16)-(19) and Part B, §§ 612 and 615 of the Education of the Handicapped Act, 20 U.S.C. §§ 1401(16)-(19), 1412 and 1415 (1988).[1]

Section 14-8.02 of the Illinois School Code, Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02.

The above statutes are reprinted in the appendix hereto. App. 73.

STATEMENT OF THE CASE

Petitioner Illinois State Board of Education ("State Board"), pursuant to the Individuals with Disabilities Education Act ("IDEA"), is responsible to ensure that all children with disabilities in Illinois between the ages of three and twenty-one are provided a free appropriate public education. 20 U.S.C. § 1412 (1988). The State Board is charged with the administration of the IDEA and the distribution of federal funds to local educational agencies to implement the provisions of the IDEA. 20 U.S.C. § 1416 (1988). The basis for the federal jurisdiction of the district

[1] Section 901(a)(1) of the Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, 104 Stat. 1141, amended the Education of the Handicapped Act to revise the short title to the "Individuals with Disabilities Education Act" (IDEA) and to replace all references to "handicapped children" with the new phrase "children with disabilities," among other substantive amendments which do not affect the sections of the IDEA at issue in this case.

court is pursuant to Section 1415(e)(2) of the IDEA. 20 U.S.C. § 1415(e)(2) (1988).

The State Board must monitor local educational agencies to ensure compliance with all the provisions of the IDEA. 20 U.S.C. § 1412 (1988). The State Board may provide special education and related services directly when it has been determined that the local educational agency is unable or unwilling to maintain a program of a free appropriate public education which meets the requirements of the IDEA. 20 U.S.C. § 1414 (1988). Illinois law provides procedures parallel to those contained in the IDEA to ensure compliance with the due process safeguards required by the IDEA. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02.

Local school boards are required to determine the eligibility of children to receive special education. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b). A case study is prepared for the child and is reviewed by professional personnel in a multi-disciplinary staff conference to develop an individualized education program ("IEP"). 20 U.S.C. § 1401(19) (1988); Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b). The parents of the child are provided with a copy of a multi-disciplinary conference summary report and informed of their right to obtain an independent education evaluation. 20 U.S.C. § 1415(b) (1988); Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b). If there is disagreement between the local school officials and the parents regarding the proposed IEP, either party may request an impartial due process hearing. 20 U.S.C. § 1415(b)(2) (1988); Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(b)(f).

In Illinois, the due process safeguards of Section 1415 of the IDEA, 20 U.S.C. § 1415 (1988), are provided through a two-tiered hearing procedure. Impartial hearing officers adequately trained in special education law

by the State Board conduct the hearings. The hearing officers are not employees of the State Board, but are actively recruited by the State Board. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(g)(h).

The Level I hearing is directed toward bringing out all facts necessary to render an informed decision. The local school board must present evidence that the special education needs of the child have been appropriately identified and that the special education program proposed to meet the needs of the child is adequate, appropriate and available. The parents and the child have the right to be present at the hearing and to present evidence and cross-examine witnesses. The hearing officer must render a decision, including findings of fact, which shall be binding upon the local school board and the parents unless an appeal is filed with the State Board.

A Level II hearing is provided to any party aggrieved by the Level I decision through appeal to the State Board. The State Board provides the impartial hearing officer to review the Level I decision. The parties may present oral argument and additional evidence before the Level II hearing officer. Upon completion of the review, the Level II hearing officer shall render a final decision. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(h).

The decisions of the impartial due process hearing officers are final without review or adoption by the State Board. The State Board is obligated to appoint the hearing officers, but cannot assert a position on the merits of the dispute between the parents and the local school district. 20 U.S.C. § 1415(b)(2) (1988). Any party aggrieved by the decision of the Level II hearing officer may bring a civil action in any court of competent jurisdiction. Ill. Rev. Stat. 1989, ch. 122, par. 14-8.02(j); 20 U.S.C.

§ 1415(e)(2) (1988). The State Board is required to monitor compliance with the final decision after all administrative and legal remedies have been exhausted. 20 U.S.C. § 1414 (1988).

This case concerns the appropriateness of a proposed IEP for Adam Brozer ("Adam"), a student at Holmes Junior High School, School District No. 21, Cook County, Illinois ("school district"). R.25, par. 6.[2] Adam is a child with disabilities within the meaning of the IDEA. R.25, par. 6. Adam's primary disability is a behavior disorder with secondary learning disability. R.25, par. 9; Decision and Order of Level II Hearing Officer, App. 43.

The facts are not in dispute. Adam was first identified as behavior disordered in May of 1986. R.25, par. 9. The school district recommended that Adam be placed in a student support center in the public school, where he would receive extensive services for his behavior disorder from the classroom teacher, with mainstreaming for physical education.[3] Respondents Sheldon and Pauline Brozer ("parents"), Adam's parents, refused the recommendation, and Adam remained in a learning disability resource program. The parents subsequently agreed to Adam's placement in

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[2] Adam is currently fifteen years old and enrolled at Stevenson High School District No. 125, Prairie View, Illinois, where he is in a self-contained classroom receiving special education and social work services for primary behavior disorder/secondary learning disability. Although Adam is no longer enrolled in Respondent School District No. 21, he remains eligible for special education services from the State and retains the right to the due process safeguards provided for children with disabilities until he is twenty-one years old.

[3] "Mainstreaming" refers to the preference to educate children with disabilities with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1412(5) (1988).

the student support center. Adam was also to receive one hour of social work related services per week, but the services were terminated by the parents. Decision of Level I Hearing Officer, App. 61.

Adam experienced problems in the unstructured setting within the public school, although he progressed in his course work and received Bs and Cs. Adam's behavior in class deteriorated; he was at times violent and disruptive. The school district recommended that Adam be transferred to an alternative public school for children who suffer from severe behavioral disorders. The parents refused. The school district agreed to continue Adam's existing placement to avoid conflict with the parents. R.18, Vol. II, Level I Transcript 2/23/90, p. 258; R.19, Vol. III, pp. 282-295.

The next school year, Adam's behavior worsened. One of his teachers described Adam as "out of control." R.18, Vol. II, Level I Transcript 2/23/90, p. 262. The parents had withdrawn consent for Adam to be disciplined in school. They had refused social work services. They would not approve the use of after school detentions or quiet lunches as interventions to control Adam's behavior. The parents refused to provide Adam's medical records to the school district. The school district therefore could not make a determination whether medication would improve Adam's behavior. Decision of Level I Hearing Officer, App. 65.

Due to the continued objections of the parents to the options proposed by the school district to improve Adam's performance in school, the school district requested a due process hearing from the State Board to determine the appropriate program for Adam. R.19, Vol. III, pp. 23-24. At the Level I hearing, the parents (who were repre-

sented by an attorney) contended that Adam had learning disabilities, which resulted in his behavior problems. Therefore, according to the parents, the school district was providing inappropriate and inadequate services to Adam. Decision of Level I Hearing Officer, App. 64.

The Level I Hearing Officer agreed with the school district that Adam had a primary behavior disorder and a secondary learning disability. The Hearing Officer found that there were irreconcilable differences between the school district and the parents.

The Hearing Officer further found that Adam's current program was not appropriate and the school district was correct in seeking a more restrictive program which would allow Adam to achieve success in school. The Hearing Officer found that Adam was in need of a restrictive placement which could provide a comprehensive structured program with immediate consequences for Adam's behavior at all times. Decision of Level I Hearing Officer, App. 66.

The Hearing Officer specifically found that the school district had complied with the procedural requirements of the IDEA:

> The District has exhibited good faith in *all* its dealings in this case. Any procedural errors, should any have occurred, are *de minimus*, given the history of refusals of service by the parents. For example, it is not reasonable that even minimal social work services be denied this child by his parents, as such action directly denies him his right to a free appropriate public education. The child's rights have been fully observed by the District.

Decision of Level I Hearing Officer (emphasis in original), App. 67.

In light of the parents' continued objections to the various proposals of the school district and the parents' "under-

mining" of the school district's efforts by making derogatory comments about school staff members in Adam's presence, the Level I Hearing Officer concluded that Adam's education could only be effectuated if the parents were not involved on a continuous basis in second guessing the disciplinary efforts of the school district. Decision of Level I Hearing Officer, App. 67-68. The Level I Hearing Officer therefore ordered that Adam should be placed at public expense in a private residential school. Decision of Level I Hearing Officer, App. 67-68.

The parents sought review of the Level I decision, requesting that Adam be maintained in the student support center at the public school or, in the alternative, that the Level I decision be modified to place Adam in the private residential school as a day student. R.45, Ex. 2.

Respondent Douglas C. Cannon, the Level II Hearing Officer, noted the "extremely adversarial and distrustful relationship" existing between the school district and the parents, as evidenced by their conduct during the hearing. The Hearing Officer found that the parents' state of mind (which he described as a "siege mentality") would likely affect the success or failure of the school district's proposed program for Adam. Decision and Order of Level II Hearing Officer, App. 44.

The Level II Hearing Officer adopted the findings of the Level I Hearing Officer that Adam's existing placement in the student support center was not appropriate to his needs and a more restrictive program was necessary to allow Adam to achieve success in school. The Level II Hearing Officer rejected the Level I Hearing Officer's order of a private residential school as being violative of the requirement of the IDEA that the child be placed in the least restrictive environment that will

meet the child's needs. Decision and Order of Level II Hearing Officer, App. 45-46.

The Level II Hearing Officer concluded that because no program for Adam would be successful without parental cooperation, a private school day placement was the only program in which parental cooperation could be achieved. Decision and Order of Level II Hearing Officer, App. 47. The Hearing Officer specifically noted the opinion of the parents' expert that it was doubtful that any program offered by the school district would be of benefit to Adam due to the parents' hostility toward the school district. Decision and Order of Level II Hearing Officer, App. 45-46. The Hearing Officer ordered Adam's referral to a private day school, located within thirty minutes commuting time of their home, that meets Adam's educational needs. Decision and Order of Level II Hearing Officer, App. 48.

The school district appealed the Level II Hearing Officer's decision to the federal district court pursuant to 20 U.S.C. § 1415(e)(2) (1988). R.1. The school district argued that the decision of the Level II Hearing Officer, finding that the irreconcilable differences between the parents and the school district necessitated a private placement, was not supported by the evidence. R.1. The school district further alleged as error the Level II Hearing Officer's reliance on parental hostility as determinative of the appropriate placement for Adam. R.1.

The district court affirmed the decision of the Level II Hearing Officer. The court found that the parents' hostility had seriously interfered with the ability of the school district to provide Adam with an appropriate education in a public school. App. 37. The court concluded that placement in a private day school facility was necessary in or-

der for Adam to obtain an educational benefit as mandated by the IDEA. App. 38.

The school district appealed to the Seventh Circuit. The Seventh Circuit stated the issue as whether the public school placement recommended by the school district was inappropriate for Adam and whether the private day placement ordered by the Level II Hearing Officer was indeed reasonably calculated to be of educational benefit to Adam. App. 6.

The Seventh Circuit affirmed the decision of the district court and the Level II Hearing Officer. App. 11-12. The court found that the school district's recommended program for Adam was not acceptable or appropriate under the IDEA because the relations between the parents and the school district guaranteed its failure. App. 9. The court agreed with the school district that consideration of parental hostility to a proposed IEP would result in rejection of the IEP "simply because the parents, perhaps irrationally, oppose it." App. 9-10. The court stated that its concern was to find a program which would be of educational benefit to the child. App. 10. The court concluded that if the parents are so opposed to an IEP as to undermine its value to the child, the IEP does not meet the substantive requirements of the IDEA. App. 11.

In a dissenting opinion, Circuit Judge Wood viewed the majority opinion as allowing the parents an absolute veto over the school district's proposed educational program. App. 13. The dissent found that the school district fully complied with the requirements of the IDEA and the decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), in that the proposed IEP was reasonably calculated to enable Adam to receive educational benefits. App. 13. The dissent noted that the "continually excessive obstructive

conduct" of the parents was not a valid reason for the majority to order a placement acceptable to the parents. App. 14, n.2.

The school district's petition for rehearing and suggestion for rehearing *en banc* was denied. App. 17.

REASONS FOR GRANTING THE WRIT

I

THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S RULING IN *ROWLEY* THAT LOCAL AND STATE EDUCATIONAL AGENCIES ARE RESPONSIBLE FOR DETERMINING AND IMPLEMENTING AN APPROPRIATE IEP FOR CHILDREN WITH DISABILITIES.

The primary responsibility for developing and executing educational programs for children with disabilities has been placed by Congress upon local and state educational agencies. This Court has recognized the States' traditional role of providing for the education of our children and has given deference to educators in choosing the educational methods most suitable to a child's needs. *Hendrick Hudson Dist. Board of Education v. Rowley*, 458 U.S. 176, 208 (1982). *Rowley* instructs that the IDEA requires State and local educational agencies to provide personalized instruction with sufficient support services to permit the child to benefit from that instruction. 458 U.S. at 203.

The decision of the Seventh Circuit, holding that an otherwise appropriate IEP does not meet the requirements of the IDEA solely because of the parents' general hostility to the proposed IEP, results in a fundamental

transformation of the *Rowley* standard. The Seventh Circuit's decision has the precedential impact of altering the carefully structured and balanced process by which educators and parents formulate individually tailored programs to provide educational and support services to children with disabilities.

In reviewing compliance with the requirements of the IDEA, *Rowley* holds that a court's inquiry is twofold:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

458 U.S. at 206-07. In applying this test, the proper focus is on the program proposed by the school district and not the program sought by the parents. *See Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 88 (D.C. Cir. 1991); *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991); *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Goodall v. Stafford County School Board*, 930 F.2d 363, 369 (4th Cir.), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991); *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987); *Wilson v. Marana Unified School Dist. of Pima County*, 735 F.2d 1178, 1184 (9th Cir. 1984); *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15, 21 (10th Cir. 1985).

The Seventh Circuit's opinion does not apply the *Rowley* test to the school district's proposed IEP. The Seventh Circuit, rather, defined the issue as whether the Level II Hearing Officer's order of a private day placement was reasonably calculated to be of educational benefit to Adam.

App. 6. The decision is not based upon any violation of the provisions of the IDEA by the school district. The Seventh Circuit accepts and gives weight to a test which allows parental objection, no matter how unreasonable, to determine whether a proposed IEP is reasonably calculated to confer an educational benefit upon the child. This test is at variance with the standard enunciated in *Rowley*, which has been consistently followed by the federal courts until now.

Congress recognized in passing the IDEA that consensus will not always be reached between school officials and parents on an appropriate IEP. The IDEA provides for an elaborate set of procedural safeguards to resolve such disputes. Section 1401(19) of the IDEA provides for parental participation in the development of the IEP.[4] Section 1415(b)(2) allows for an impartial due process hearing to determine whether the local educational agency is providing a free appropriate public education.

The decisions rendered in this case by the hearing officers and the courts frustrate the carefully tailored scheme of providing education to children with disabilities. The decision-makers allowed the parents' hostility to dominate the process, instead of considering the parents' hostility as one factor in determining the appropriate plan to meet Adam's educational needs. Support services, such as psychological and counseling services, could have been provided in Adam's IEP to address his ability to receive an educational benefit in light of his parents' hostility to an otherwise appropriate IEP. 20 U.S.C. § 1401(17) (1988).

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[4] Section 1401(19) does not require parental approval of the IEP. 20 U.S.C. § 1401(19) (1988).

In passing legislation to ensure that children with disabilities receive a free appropriate public education, Congress never intended that the emotional and non-measurable forces of parental approval should control the educational decision. On the contrary, the responsibility was placed on the State and local educational agencies to determine the appropriate IEP for children with disabilities. 20 U.S.C. §§ 1401(18)-(19).

The Seventh Circuit's decision has sanctioned parental rejection of a school district's proposed IEP "simply because the parents, perhaps irrationally, oppose it." App. 9-10. Compliance with the Seventh Circuit's decision will result in educators being forced to acquiesce in the demands of parents, regardless of whether those demands enable the child to receive any educational benefit. *See* dissenting opinion, App. 12-15.

The Seventh Circuit's decision leaves the administration of education for children with disabilities in confusion. The States are responsible to assure compliance with the provisions of the IDEA. 20 U.S.C. § 1412 (1988). The language of the IDEA indicates that such compliance is measured by evaluating local educational agencies' provision of special education to children with disabilities. 20 U.S.C. §§ 1412 and 1413. The Seventh Circuit's decision reaches outside the language of the IDEA to measure compliance by focusing on parental approval of the education provided by the local educational agencies.

The error in the Seventh Circuit's reasoning is clearly illustrated in this case. It is telling that none of the parties here has obtained the relief from the administrative and court proceedings which was originally sought. The Brozers sought Adam's retention in the local school. The school district proposed that Adam attend a public school

operated by the district for children like Adam with behavioral and learning disorders. The Level I Hearing Officer ordered a private residential placement. The Level II Hearing Officer, whose decision was affirmed by the district court and the Seventh Circuit, ordered a private day placement.

When Adam recently transferred to a new school district, the school district proposed to continue Adam in the private day placement, which was affirmed as appropriate by the Seventh Circuit. App. 11-12. The parents rejected this proposal. Adam is now attending the public high school in a self-contained classroom receiving special education and social work services. Thus, it appears that contrary to the parents' defense of the Level II Hearing Officer's decision in the courts below, the parents were in fact dissatisfied with the private day placement. The parents continue to insist on their preferred placement in the local school.

The Seventh Circuit's articulated concern to find a program that will be of educational benefit to the child was not realized in this case. App. 10. It is not in the best interest of the child's educational needs to abandon an IEP found to be educationally appropriate to meet those needs. As the dissent aptly noted, "The district board, the hearing officers, the district court and I all agree it was the parents' objectionable conduct which has forced this result." App. 14, n.2.

"This result" leaves the child without an educational program objectively designed to enhance the child's educational achievement and allows a parental veto over decisions made by professional educators. The Seventh Circuit's decision sets a disturbing precedent which must be reversed by this Court.

II

THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THE DECISIONS OF THE OTHER CIRCUITS THAT PARENTAL PREFERENCE DOES NOT DETERMINE THE APPROPRIATENESS OF AN IEP.

The Seventh Circuit's decision not only fails to follow this Court's holding in *Rowley*, but conflicts with the decisions of the other circuits which have consistently followed the *Rowley* standard. The other circuits have applied the *Rowley* standard by focusing on the proposed IEP, not the alternative program sought by the parents. *Kerkam v. Superintendent, D.C. Public Schools*, 931 F.2d 84, 88 (D.C. Cir. 1991); *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991); *Roland M. v. Concord School Committee*, 910 F.2d 983, 993 (1st Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); *Goodall v. Stafford County School Board*, 930 F.2d 363, 369 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 L.Ed.2d 149 (1991); *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989); *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987); *Wilson v. Marana Unified School Dist. of Pima County*, 735 F.2d 1178, 1184 (9th Cir. 1984); *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15, 21 (10th Cir. 1985).

The Seventh Circuit's opinion does not discuss the appropriateness of the school district's proposed IEP. The court summarily rejected the IEP as violative of the second prong of the *Rowley* test because the parents' hostility to the proposed IEP guaranteed its failure. The Seventh Circuit improperly focused on the conduct of the parents in determining whether the school district's proposed IEP complied with the requirements of the IDEA.

The other circuits have addressed the same conflict which confronted the Seventh Circuit, with the opposite

result. The circuits have properly applied the *Rowley* test to "focus on the District's proposed placement, not on the alternative that the family preferred." *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). In *Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir.), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991), the Fourth Circuit found the school officials' offer of services to be in compliance with the requirements of the IDEA, over the parents' objection that the services were meaningless to the child. The court stated that any lack of benefit to the child was due to the decisions and conditions the parents had made for their child's education and not due to any violation by the school of the requirements of the law. *Id.* at 369. In *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991), the First Circuit refused to "abet" parents who objected to an IEP created "by their own obstructionism" and found the school district's proposal to meet the *Rowley* standard. *Id.* at 995.

The Seventh Circuit itself has held that

> *Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right . . . to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their child.

Lachman v. Illinois State Board of Education, 852 F.2d 290, 297 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988). The majority opinion distinguished *Lachman* as not dispositive of the issue presented here. App. 9. The dissent found no difference between the dispute presented and the dispute considered in *Lachman*. App. 13.

The Seventh Circuit distinguished all other reported cases on the facts and ignored the *Rowley* standard to be

applied to the legal analysis. *See* App. 9-10, n.4. Whether the dispute involves educational theory,[5] the parents' unilateral removal of their child from the approved IEP,[6] or the parents' objection to the IEP after its implementation,[7] the school district's responsibility under the dictates of the IDEA and *Rowley* remains the same. It is the parents' conduct, not any deficiency in the school district's proposed IEP, which would prevent Adam from receiving an educational benefit.

The IDEA requires school districts to provide a "basic floor of opportunity" of specialized instruction and related services individually designed to provide an educational benefit to a child with disabilities. *Rowley*, 458 U.S. at 201. The IDEA does not require the instruction provided to "be the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the *best* choice." *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991) (emphasis in original). It is the parents' choice to accept the free appropriate public education provided or to reject it. Here, the parents, by their very conduct, chose to reject the education offered by the school district.

The Seventh Circuit's opinion attempts to avoid the harsh result of the parents' decision by skewing the *Rowley* test. The other circuits have correctly applied *Rowley* and focused on the conduct of the school district, thus

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[5] *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[6] *Cain v. Yukon Public Schools, Dist. I-27*, 775 F.2d 15 (10th Cir. 1985); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, ____ U.S. ____, 116 L.Ed.2d 149 (1991); *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988).

[7] *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990).

avoiding the dilemma created by the hearing officers and the courts in this case.

The Seventh Circuit's decision stands alone in conflict with the clear command of *Rowley* and its uniform acceptance by the other circuits. Accordingly, this Court should exercise its supervisory power to reverse the Seventh Circuit's deviation from the standard applied by the other courts of appeals.

CONCLUSION

For all of the reasons stated above, Petitioner respectfully requests that this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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